IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.208 OF 2007

Smt.Kamladevi Diwan .. Petitioner.

Versus

Bombay Isle Developers Pvt.Ltd. .. Respondent.

Mr.Bobde i/b.Y.R.Shah for petitioner.

Mr.Gaurang Joshi i/b.RMG Law Associate for respondent.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 31st August, 2007.

P.C.:

1. The petitioner has filed this petition under Section 9 of the Arbitration And Conciliation Act, 1996, claiming interim reliefs, pending the disposal of the reference, more particularly, described at Annexure "A" to this petition. The respondents are Builders and Developers.

2. The petitioner submits that she is a senior citizen and is aged 82 years and has several ailments with which she is suffering.

3. The said property originally had a ground plus two storeyed structure and the petitioner is presently occupying premises on the second floor. The first and ground floors are occupied by various tenants and occupants.

4. As is usual with such old structures and the owners thereof, a deal was struck between the petitioner and the respondents- developers, who showed their interest in redevelopment of the property of the petitioner. The petitioner and her husband, senior citizens, the husband being no more, entered into an Agreement after prolonged negotiations and terms. According to the petitioner, the terms are that she was to get ownership premises on the 6th floor being approximately admeasuring 1527 sq.ft. and part of 5th floor of area admeasuring 641 sq.ft. This is 35% of the new construction and 10% additional balcony and other benefits under the D.C. Rules.

5. The grievance is that the respondents were to shift the tenants and occupants of the petitioner from the ground floor and provide them with permanent alternate accommodation on the third floor of the new building with the same area as occupied by them in the old structure.

The tenants of the first and second floor of the old structure were to remain on the same premises, occupied by them and the petitioner was to get exclusive rights over the terrace above the 6th floor of the new construction and 35% additional car parking space on the ground floor.

6. However, there are additional terms recording sharing of the total built up area in the ratio of 65% belonging to the respondents and 35% belonging to the petitioner in new construction.

7. The construction was to commence within a period of 18 months from the issuance of the Development and the construction permission (IOD/CC) from the Bombay Municipal Corporation.

8. It is the case of the petitioner that for more than four years since the date of the Agreement, no construction was carried out as per the sanctioned plan and everybody, including the petitioner and the tenants were put to inconvenience. The respondents were not successful in providing the tenants with alternate accommodation and shifting them as agreed. Thus, between 2001 to 2006, things were at stand still.

9. It is the grievance of the petitioner that a suit being Suit No.3105 of 2005 was filed in the City Civil Court, challenging the action of the Corporation sanctioning the plan contrary to the Agreement between parties. Interim reliefs were sought in the said suit which were not granted and ultimately the matter was carried to this Court which directed expeditious hearing of the Notice of Motion No.3454 of 2005.

10. When the Notice of Motion was taken up for hearing, the respondents raised the plea that the Agreement contains an arbitration clause and, therefore, suit is not maintainable. These contentions were rejected on 2nd March, 2006 and the matter was carried to this Court in Appeal From Order.

11. When the matter was sent back once again to the City Civil Court, both sides decided to amicably settle their disputes and that is how, Consent Terms dated 6th May, 2006 were filed, a copy whereof is at Annexure-D to this petition.

12. Now disputes and differences have arisen with regard to the implementation of the obligations under these Consent Terms.

13. Before proceeding further, it would be appropriate if a reference is made to the Consent Terms and, more particularly, the Clauses 3,4,8 and 11 therein which read thus :-

> "3. The defendant No.1 shall in addition to the above payment and one stilt agreed under the Agreement shall provide one more stilt to the plaintiff free of cost and deliver the possession thereof to the plaintiff simultaneously with the delivery of possession of plaintiff’s flat ear marked under the Agreement.
>
> 4. The defendant No.1 shall complete the balance of work of construction of the building and obtain Occupation Certificate and deliver possession of the flats as provided under the Agreement.
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> 8. The terms of the Agreement dated 31st October, 2001 stands hereby modified to the extent of above terms. It is further agreed between the parties that as per the development Agreement dated 31st October, 2001 the plaintiff and

defendant No.1 hereby share the built up area of new construction on the ground, 4th, 5th, 6th floor which consumes FSI in the ratio of 35:65 respectively. The parties hereby agree and confirm that the following will be the built up area share of the respective parties.

Plaintiff (35%) (2168 sq.ft.)	Defendant No.1(65%) (4026 sq.ft.)
(a) 1527.09 sq.ft. on 6th floor	(a) Ground Floor Shop 1067.53 sq.ft.
(b) 641 sq.ft. from part of 502 flat on 5th floor.	(b) 4th floor 1800.03 sq.ft.
	(c) 5th floor 501 927.29 sq.ft.
	(d) 5th floor part of 502 231.15 sq.ft.

11. The plaintiff agrees declares and confirms that she has no objection to the amended plans submitted to the Municipal Corporation for

approval and will not raise any objection thereto hereinafter. The defendant No.1 shall be entitled to make further additions and alterations to the plans as may be required by Municipal Corporation of Greater Mumbai. The plaintiff hereby accords and consents to all the plans existing, approved or submitted for approval by the defendant No.1. However, under no circumstances, the rights of the plaintiff reserved under the Agreement dated 31st October, 2001 shall be prejudiced."

14. After the consent terms were tendered and order made in terms thereof, according to the petitioner, there was a demand, raised by the tenants with regard to the area that is agreed to be allotted to them. A copy of the letter is at Page 98 to this petition.

15. Thereafter, difficulties and obstacles were placed before the respondents-developers and there was prolonged correspondence between either the petitioner and the respondents or the tenants and the respondents. Ultimately, on 5th January, 2007, the petitioner addressed a letter to the respondent through her Advocate, making grievance, firstly with regard to the change of security agencies and thereafter about the implementation of the

terms.

16. It is contended in these letters that the respondents have breached the obligations inasmuch as they have agreed to allot more area to the tenants then what has been occupied by them as on today and this is done without the consent of the petitioner. Various breaches were alleged and it is contended that the entitlement has been unilaterally reduced. These contentions have been denied by the respondents. Ultimately, the petitioner decided to invoke the Arbitration Agreement/Clause and it is contended that the petitioner is ready and willing so also desirous of referring the dispute to the Arbitrator. During the course of arguments and even after they concluded, time was granted to parties to arrive at agreed interim measures. The idea was that rights of the petitioner and respondents be protected and the Arbitrator resolves the disputes in accordance with the terms of the Agreement.

17. This matter was extensively argued and Mr.Joshi, appearing for the respondents, made certain without prejudice proposals. However, after they were discussed at length even in Court, Mr.Bobde, appearing for the petitioner informs that the petitioner’s apprehensions are

not taken care of by such proposals and it would be fair if this Court passes appropriate orders.

18. That is how the matter has been placed before me and I have to proceed to pass the order.

19. In reply to the petition, the respondent does not deny the facts insofar as they are material and up to the stage of Consent Terms, being filed. However, it is contended that the respondent stands committed to more than 35% area of the total construction of the new building being provided to the petitioner. The respondent, in reply to the petition in paragraph 9 has stated that the petitioner is entitled to ownership premises on the 6th floor being approximately 1526 sq.ft. and part of the fifth floor area of 641 sq.ft., which forms part of 35% of the new construction. However, the entitlement to 10% additional balcony and other benefits is denied. It is denied by the respondents that the obligations to shift the tenants and occupants of the petitioner by providing them with permanent alternate accommodation on the third floor of the new building is that of the respondent but according to the respondent, the duty in that behalf is that of the petitioner. However, the respondent is duty bound to accommodate the

said tenants on the third floor of the newly constructed building. It is contended that the terrace above the sixth floor is the common terrace for all the occupants of the building and, therefore, the petitioner cannot get exclusive rights with regard thereto but she would have exclusive terrace on adjoining sixth floor flat. She will get 35% car parking space on the ground floor, sanctioned by the B.M.C. including one enclosed garage under the stilt area as per the Agreement and the Consent Terms. In such circumstances, while not denying the entitlement of the petitioner, the respondent contends that the final plan was prepared and filed on 24th July, 2006 and was sanctioned on 25th July, 2006 with certain modifications. The total area of 6082.52 including balcony is sanctioned for construction and a copy of the sanctioned plan is annexed at Exhibit-A to the affidavit in reply. Thus, it is denied that there are lots of changes. There is no attempt to reduce the entitlement of the petitioner either deliberately or otherwise. In paragraph 20 of the affidavit in reply so also in paragraphs 24 and 25, this is what is stated :-

> "20. With reference to paragraph 19, it is denied that as per the sanctioned plan dated 25th July, 2006, there were four shops of 83 sq.meters

shown on the ground floor while the same was converted into one shop of 981 sq.ft., which is contrary to the sanctioned plan and done deliberately to reduce the petitioner's area by around 100 sq.ft. It is submitted that as per the Consent Terms, the respondent is entitled for ground floor shop of 1067.53 sq.ft., but as per the sanctioned plan, it had got an approval of 895 sq.ft. shop only and the respondent is constructing as per the said plans.

24. With reference to paragraph 22(b), as per Clause 8 of the Consent Terms, the parties had agreed to division of the FSI in the ratio of 35:65 i.e. the plaintiff was entitled to an area of 2168 sq.ft. and the respondent was entitled to an area of 4026 sq.ft. The said area was inclusive of 10% balcony also. The respondent is granting 6th floor flat admeasuring about 1590.27 on the 6th floor, including balcony to the petitioner. Hence, the petitioner is getting more than same as agreed in the Consent Terms. It is submitted that once a plan was submitted for approval, BMC sanctions the same with some modifications and, therefore, area of each floor

sometimes changes. As per the sanctioned plan, the total area sanctioned is 6082.52 sq.ft., out of which petitioner will get an area of 2128 sq.ft. i.e. 35% and the respondent will get an area of 3954.52 sq.ft. i.e. 65% of the total area.

25. With reference to paragraph 22(c), as per the sanctioned plan, the petitioner will be entitled to an area of 538 sq.ft. and the balance 326.13 sq.ft. will be the respondent's share i.e. 65%. The said area is as per the Consent Terms filed by the parties. It is stated that only because of alterations and modifications suggested by BMC whilst sanctioning the plans, the areas of respective floors have changed but both parties shall receive the area in the ratio of 35:65."

20. Having perused this petition and the affidavits in reply so also the annexures of both and the rejoinder affidavit, to my mind, it is not necessary to go into larger issues because the matter will be referred to arbitration as is urged by the petitioner in terms of the Agreement and Mr.Bobde states that an application to appoint an Arbitrator in terms of the Agreement would be

moved shortly. It would not be appropriate for me to enter into the merits of the controversy. Having perused the petition and the affidavits filed in reply and rejoinder, I am of the view that the disputes between the petitioner and the tenants, the petitioner and the respondent and the other issues concerning the Agreement/Consent Terms must be raised before the learned Arbitrator. The Arbitral Tribunal would after giving opportunity to both sides, make an appropriate Award. Any observations or comments with regard to the obligations are bound to prejudice both sides. In such circumstances, the only interim order that can be made is that while permitting the respondent to undertake and complete the construction as per the sanctioned plans, the entitlement of the petitioner should be protected, that is, the subject matter of the proposed reference to arbitration. That is not being denied also by the respondents. In such circumstances, the interim order that would be made is to permit the respondents to construct as per the sanctioned plans but at the same time ensure that the area that would be available for the petitioner is kept intact, unencumbered, vacant and available for the occupation by the petitioner in terms of the Agreement. This would be without prejudice to the rights and contentions of both sides in the Arbitration.

21. All that is requested by Mr.Bobde, appearing for the petitioner is that even if the construction can proceed and the occupants/tenants can be put in possession of occupation of their premises subject to appropriate premises, the entitlement of the petitioner as per the Agreement/Consent Terms dated 6th May, 2006 should be honoured first by the respondent and thereafter, it would be open for the respondent to fulfil other commitments.

22. That request is not completely acceptable to the respondent inasmuch as the respondent points out the difficulties with regard to putting the petitioner in possession of the area to which she is entitled before fulfilling the commitment to tenants. The respondent's contention is that the said area is on the 5th and 6th floor partly. In other words, it is partly on the 5th floor and entirely on the 6th floor of the proposed building. The fifth floor is authorised and sanctioned construction, whereas with regard to the 6th floor, appropriate permissions and even request for regularisation is necessary. Mr.Joshi submits that the said construction is capable of being regularised because plans have already been sanctioned. The Commencement Certificate for the sixth floor is not being granted

because the tenants are to be first shifted to their respective areas.

23. The construction is complete to the extent of 90%. The internal walls are being constructed and works are being carried out at site.

24. In my view, halting the construction would not be in the interest of both sides, considering the age of the petitioner and the fact that tenants are also to be rehabilitated/provided with permanent alternate accommodation. The respondent to carry on the construction work as above and to the extent indicated by the approved plans. The same is allowed to go on uninterrupted or unobstructed. However, the request of Mr.Bobde that before anybody else is put in occupation of the premises, physically by the respondent, the petitioner’s area or entitlement be ensured, is reasonable. In other words, the sixth floor part construction which is yet to be regularised and request made in that behalf being pending, the respondent should not be allowed to take further steps, if any, is the request.

25. However, the respondents affidavit and the

submissions before the Court would indicate that after putting up the construction, no progress has been made except applying for occupation certificates. Therefore, all that can be done today at site not to allow any rights to be created without ensuring that the petitioner's area is made available.

26. Therefore, the respondents would be at liberty to apply for part occupation certificate and also for regularisation of the construction made on the sixth floor, however, as and when the part occupation certificate is obtained, the respondent to inform the petitioner about the same. The petitioner would be intimated in writing by the respondent within a period of ten days after obtaining the part occupation certificate for 3rd to 5th floor. Upon the petitioner being intimated so, the petitioner is at liberty to apply for further interim reliefs/measures within a period of four weeks from the date of receipt of such communication. If no application is made, the respondent would be at liberty to put the tenants in occupation of their respective areas without in any manner disturbing the entitlement of the petitioner. However, if the petitioner applies for interim measures at that stage, it would be open for the Arbitral Tribunal or this Court to pass appropriate

orders, depending upon the circumstances then prevailing.

27. It would be open for the respondent to communicate to the petitioner his desire to put the petitioner and third parties with whom he has entered into Agreements in possession/occupation of their areas after part occupation certificate has been obtained and subject to the petitioner's right so also the liberty granted to move for other interim measures within the time stipulated above, the respondent would be at liberty to discharge his obligations with them.

28. Hence, the following order :-

a) The respondents are allowed to construct as per the sanctioned plan by keeping intact the area available to the petitioner i.e. the area on the 6th floor being approximately admeasuring 1527 sq.ft. and part of the 5th floor admeasuring 641 sq.ft., unencumbered, vacant and available for use, enjoyment and occupation by the petitioner in terms of the Agreement. In other words, the petitioner will be entitled to 35% area of the new construction and 10% additional balcony and other benefits under the D.C. Rules.

b) The respondents to carry on construction work as per the sanctioned plan on a total area sanctioned i.e. 6082.52 sq.ft., out of which the petitioner will get an area of 2128 sq.ft. equivalent to 35% of the total area and the respondents will get the remaining area i.e. 3954.52 sq.ft. equivalent to 65% of the total area.

c) It is made clear that no third party rights or encumbrances shall be created on the site without ensuring / demarcating the area made available for the petitioner.

d) It would be open for the respondents to communicate to the petitioner his desire to put the petitioner and or third party with whom he has entered into agreements, in possession / occupation of their areas after the part occupation certificate has been obtained and subject to the liberty granted to the petitioner in paragraph 26 above.

e) It will also be open for the petitioner to

adopt appropriate proceedings to seek other interim reliefs / measures within the time stipulated in paragraph 26 above.

f) Liberty to apply. No costs.

29. Arbitration petition stands disposed of with the aforesaid directions.

(S.C.Dharmadhikari, J.)